

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

Number: **202144006**

Release Date: 11/5/2021

Index Number: 9100.00-00, 856.00-00,  
565.00-00

Third Party Communication: None  
Date of Communication: Not Applicable

Person To Contact:  
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Refer Reply To:  
CC:FIP:B03  
PLR-102984-21

Date:  
August 06, 2021

### LEGEND:

Taxpayer =  
  
Partnership 1 =  
Partnership 2 =  
Firm =  
State 1 =  
State 2 =  
Foreign Country =  
Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Date 5 =  
Date 6 =  
Year 1 =  
a =

Dear :

This ruling responds to a letter dated February 3, 2021, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election under section 856(c) of the Internal Revenue Code ("Code") to be treated as a real estate investment trust ("REIT") effective as of Date 1 and to make a consent dividend election under section 565(a) for the taxable year ended Date 3.

## FACTS

Taxpayer is a State 1 corporation that was formed on Date 1 and is indirectly owned by Partnership 1. Partnership 1 is a Foreign Country entity that is classified as a partnership for U.S. federal income tax purposes. During Year 1, all of Taxpayer's common stock was owned by Partnership 1, and Taxpayer represents that the common stock is consent stock within the definition of section 565(f)(1) of the Code. Partnership 1 was formed by affiliates of Partnership 2, a State 2 limited partnership. Partnership 2 provides management services to Taxpayer.

Taxpayer's Articles of Incorporation state that the purposes of Taxpayer include "engaging in business as a real estate investment trust under the Internal Revenue Code of 1986." They also empower Taxpayer to direct a consent dividend to its common stockholders when necessary or appropriate to ensure or maintain Taxpayer's REIT status and to comply with any associated distribution requirements.

In addition, a Confidential Private Placement Memorandum related to the issuance of Taxpayer's preferred stock, dated Date 2, states that Taxpayer "will elect to be treated, and expects to qualify, as a real estate investment trust, or REIT, for federal income tax purposes beginning with its short taxable year ended Date 3 under section 856 of the Internal Revenue Code of 1986." That memorandum also stated that Taxpayer intends to "make 'consent dividends' for tax purposes as may be necessary or appropriate to ensure or maintain" Taxpayer's REIT status and to comply with any distribution requirements associated with such status.

Taxpayer intended to make a REIT election under section 856 on its Form 1120-REIT, *U.S. Income Tax Return for Real Estate Investment Trusts*, effective for its initial taxable year that began Date 1 and ended Date 3.

Taxpayer also intended to make a consent dividend election under section 565(a) by attaching the required Form 972, *Consent of Shareholder to Include Specific Amount in Gross Income*, which Taxpayer received from Partnership 1, and Form 973, *Corporation Claim for Deduction for Consent Dividends*, to Taxpayer's Form 1120-REIT for its initial taxable year ended Date 3. Consistent with that intention, Partnership 1 timely filed its Form 1065, *U.S. Return of Partnership Income*, for its taxable year ended Date 3 treating Taxpayer as a REIT and including ordinary dividends that were treated as paid by Taxpayer during Year 1, including \$    of consent dividends under section 565.

As part of the management services that Partnership 2 provides to Taxpayer, Partnership 2 assists Taxpayer with conducting its business in compliance with sections 856 through 860. Partnership 2 generally engages Firm to assist with the preparation of tax returns and related extension applications for entities managed by Partnership 2, including Taxpayer.

Taxpayer's Form 1120-REIT or, in the alternative, a Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and*

*Other Returns*, was due on Date 4. A timely filed Form 7004 would have extended the due date of Taxpayer's Form 1120-REIT to Date 5. Partnership 2 and Firm met during the fourth quarter of Year 1 to discuss the tax return obligations of entities managed by Partnership 2 for their taxable years ending on Date 3. Firm was engaged to prepare Form 7004 for certain entities managed by Partnership 2 that were included in a Microsoft Excel-based list ("Entity List"). Firm was also engaged to prepare the relevant income tax return forms for the entities on the Entity List by their extended due dates. Because Taxpayer was a newly formed entity, Taxpayer was inadvertently left off of the Entity List. This omission resulted in the failure to timely file Taxpayer's Form 7004 by Date 4 and, therefore, resulted in the failure to timely file Taxpayer's Form 1120-REIT and the associated Forms 972 and 973 implementing Taxpayer's consent dividend election.

Partnership 2 discovered the error shortly after Date 5 and immediately engaged Firm to prepare both Taxpayer's Form 1120-REIT for its taxable year ended Date 3 and this request for an extension of time to elect to be treated as a REIT beginning Date 1 and to elect to make a consent dividend of \$ a for the taxable year ended Date 3. In Date 6, Taxpayer filed the Form 1120-REIT in accordance with Taxpayer and Partnership 1's intention to elect to treat Taxpayer as a REIT beginning Date 1 and to make the consent dividend election for the taxable year ended Date 3.

Taxpayer makes the following additional representations as to each request:

1. The request for relief was filed by Taxpayer before the failure to make the regulatory election was discovered by the IRS.
2. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 at the time Taxpayer requested relief and the new position requires or permits a regulatory election for which relief is requested.
3. Being fully informed of the required regulatory election and related tax consequences, Taxpayer did not choose to not file the election.
4. Taxpayer is not using hindsight in requesting this relief. No specific facts have changed since the due date for making the election that makes the election advantageous to Taxpayer.
5. Granting the relief will not result in Taxpayer having a lower tax liability in the aggregate for all years to which the regulatory election applies than Taxpayer would have had if the election had been timely made (taking into account the time value of money).
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer for the taxable year for which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had it been timely filed.

Affidavits on behalf of Taxpayer have been provided with the submission as required by section 301.9100-3(e).

#### LAW AND ANALYSIS

Section 856(c)(1) provides that a corporation, trust, or association shall not be considered a REIT for any taxable year unless it files with its return for the taxable year an election to be a REIT or has made such an election for a previous taxable year, and such election has not been terminated or revoked. Pursuant to section 1.856-2(b) of the Income Tax Regulations, the election shall be made by the trust by computing taxable income as a REIT in its return for the first taxable year for which it desires the election to apply.

Section 565(a) provides that, if any person owns consent stock (as defined in section 565(f)(1)) in a corporation on the last day of the taxable year of such corporation, and such person agrees, in a consent filed with the return of such corporation in accordance with regulations prescribed by the Secretary, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in subsection (b), constitute a consent dividend for purposes of section 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) provides that the dividends paid deduction, as defined in section 561, includes the consent dividends for the taxable year. A consent dividend is a hypothetical distribution (as distinguished from an actual distribution) made by certain corporations to any person who owns consent stock on the last day of the taxable year of such corporation and who agrees to treat the hypothetical distribution as an actual dividend, subject to the limitations set forth in section 565, and sections 1.565-2 and 1.565-1(c)(2), by filing a consent at the time and in the manner specified in section 1.565-1(b). Under section 1.565-1(b)(3) and Rev. Rul. 78-296, 1978-2 C.B. 183, a consent may be filed no later than the extended due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election to mean an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith,

and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer generally is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith, however, if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

## CONCLUSION

Based on the information submitted and the representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to elect under section 856(c) to be treated as a REIT effective as of Date 1 and to make a consent dividend election under section 565(a) and section 1.565-1(b)(3) of the Income Tax Regulations for its taxable year ended Date 3.

Accordingly, due to the reasonable extension of time granted to Taxpayer, the election to be treated as a REIT beginning Date 1 and the consent dividend election for its taxable year ended Date 3, made on Taxpayer's Form 1120-REIT filed in Date 6, are considered timely elections.

This ruling is limited to the timeliness of the filing of Taxpayer's REIT election made under section 856(c) and consent dividend election made under section 565(a)

for its taxable year ended Date 3. This ruling's application is limited to the facts, representations, and Code and regulation sections cited herein. No opinion is expressed with regard to whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of Chapter 1 of the Code. Furthermore, no opinion is expressed regarding the timeliness of Taxpayer's federal income tax return.

Except as specifically provided otherwise, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

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Grace Cho  
Assistant to the Branch Chief, Branch 3  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

Enclosure:

Copy for section 6110 purposes

cc: